

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL -8 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

JAMES L.,	)	2 CA-JV 2010-0010
	)	DEPARTMENT A
Appellant,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC	)	Appellate Procedure
SECURITY, JESSICA E., CRYSTAL E.,	)	
REBECCA L., and TABETHA L.,	)	
	)	
Appellees.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J164874

Honorable Stephen M. Rubin, Judge Pro Tempore

AFFIRMED

Child Advocacy Clinic

By Paul D. Bennett, a clinical professor appearing  
under Rule 38(d), Ariz. R. Sup. Ct.

Tucson  
Attorney for Appellant

Terry Goddard, Arizona Attorney General  
By Claudia Acosta Collings

Tucson  
Attorneys for Appellee Arizona  
Department of Economic Security

H O W A R D, Chief Judge.

¶1 In this appeal, James L., father of Rebecca and Tabetha, challenges the juvenile court's January 8, 2010 order finding the children dependent. None of the issues he raises merits reversal; therefore we affirm the court's order.

¶2 James first contends the order adjudicating the children dependent is deficient because the juvenile court merely found the allegations in the dependency petition were true and did not enter specific findings of fact pursuant to Rule 55(E), Ariz. R.P. Juv. Ct. See also A.R.S. § 8-844(C)(1)(a)(ii). The Arizona Department of Economic Security (ADES) is correct that James waived this claim by not objecting below or requesting findings of fact. See *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007) (when party fails to object before juvenile court in severance proceeding to "alleged lack of detail in the juvenile court's findings," issue deemed waived and appellate court will not address it.) "[A] party may not 'sit back and not call the trial court's attention to the lack of a specific finding on a critical issue, and then urge on appeal that mere lack of a finding on that critical issue . . . as a ground[ ] for reversal.'" *Id.*, quoting *Bayless Inv. & Trading Co. v. Bekins Moving & Storage Co.*, 26 Ariz. App. 265, 271, 547 P.2d 1065, 1071 (1976) (alteration added).

¶3 James also challenges the sufficiency of the evidence to prove the allegations of the dependency petition, which the juvenile court found were true. ADES alleged in the petition, inter alia, that Rebecca, Tabetha and James's two stepchildren previously had been the subject of dependency proceedings in Ohio and Arizona and that an earlier dependency proceeding in Arizona had involved James's physical abuse of one of his stepchildren. According to the most recent dependency petition at issue here, the

previous dependency had been terminated in March 2009 after the family was provided various services. ADES further alleged Jessica, the eldest of James's stepchildren, had been physically abusive toward the younger children; a Child Protective Services (CPS) investigator had found the home "unfit for the younger children"; and the house posed "[m]ultiple health and safety concerns . . . including rotting food throughout the home and sharp, hazardous items strewn throughout the home." Rebecca and Tabettha reportedly were sent to school "dirty with dirty, matted hair." ADES also alleged that James "uses inappropriate discipline with the children" and "encourages fighting and violence between the children," that the children were neglected, and that James did not protect them.

¶4 We review the juvenile court's order adjudicating children dependent for an abuse of discretion. *See In re Pima County Juv. Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987). A dependent child is a child adjudicated to be "[i]n need of proper and effective parental care and control and who has no parent or guardian . . . willing to exercise or capable of exercising such care and control," or "[a] child whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent." A.R.S. §§ 8-201(13)(a)(i),(iii). Dependency must be established by a preponderance of the evidence. *See Ariz. R.P. Juv. Ct. 55(C)*. In reviewing the court's order, we view the evidence in the light most favorable to sustaining it. *See Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005).

¶5 There is ample evidence in the record to support the allegations of the dependency petition and any additional findings we may infer the juvenile court made,

given the evidence presented and the outcome of the hearing. *See Marco C. v. Sean C.*, 218 Ariz. 216, n.3, 181 P.3d 1137, 1141 n.3 (App. 2008) (“We may generally infer findings of fact necessary to sustain a court’s order.”) The evidence included, inter alia, the testimony of CPS investigator Cindy Yates who reviewed the history of the case, the previous dependencies, and the circumstances that gave rise to ADES’s filing the most recent petition.

¶6 James also contends removing Jessica from the home, rather than the other children, and providing services to the family, could prevent the need to remove Rebecca and Tabatha, and asserts the juvenile court failed to consider this “mitigating factor.” *See* A.R.S. § 8-844(B) (“The court shall take into consideration as a mitigating factor the availability of reasonable services to the parent or guardian to prevent or eliminate the need for removal of the child . . . .”). He asserts, “Such a plan worked before and might have worked again.” We agree with ADES that removing Jessica from the home is not a “service” for purposes of the statute. ADES is also correct that removal of Jessica would not have negated the finding of dependency here as to the remaining children. Jessica’s conduct and her violence was only one part of what the court appears to have considered relevant to its determination that the children were dependent.

¶7 We note, in addition, that in September 2009, in a minute entry issued after the preliminary protective hearing, the juvenile court found ADES “ha[d] made reasonable efforts to prevent the removal of the children and to reunify the family, including: Existing services in prior dependency.” We can infer the court made this

finding in adjudicating the children dependent here as well. Sufficient evidence supports that finding.

¶8 We also reject James’s argument that the juvenile court erred in permitting ADES to introduce evidence relating to the prior dependency proceeding in support of its most recent petition. He argues he did not have a fair hearing because he was not permitted to introduce similar evidence. In part, James refers to ADES’s request, at the end of the dependency hearing, that the court take judicial notice of allegations in the dependency petition ADES had filed in a previous proceeding, the “time period of that depend[e]ncy, and the reasonable efforts findings that were made during that depend[e]ncy.” Overruling James’s objection that the evidence was not relevant, the court took judicial notice of the information.

¶9 The juvenile court “has broad discretion in admitting or excluding evidence, and we will not disturb its decision absent a clear abuse of its discretion and resulting prejudice.” *Lashonda M. v. Ariz. Dep’t of Econ. Sec.*, 210 Ariz. 77, ¶ 19, 107 P.3d 923, 928-29 (App. 2005). “Generally, an abuse of discretion ‘is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *Id.*, quoting *Quigley v. Tucson City Court*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (1982). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more . . . or less probable.” Ariz. R. Evid. 401. Relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

cumulative evidence.” Ariz. R. Evid. 403; *see also* Ariz. R. Evid. 402. “Evidence is unfairly prejudicial only if it has an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy, or horror.” *State v. Gulbrandson*, 184 Ariz. 46, 61, 906 P.2d 579, 594 (1995). “Because ‘[t]he trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice,’ the trial court has broad discretion in this decision.” *State v. Connor*, 215 Ariz. 553, ¶ 39, 161 P.3d 596, 607 (App. 2007), *quoting* *State v. Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d 513, 518 (App. 1998) (alteration in *Connor* ).

¶10 The juvenile court did not abuse its discretion. The evidence provided the court with a broad picture of the parents’ abilities to care for the children over a period of time and established the family dynamics and patterns of behavior that persisted despite previously provided services. One case worker testified, without objection, about the significance of this history to the current dependency proceeding and the case plan goal of severance and adoption. As we noted above, among the issues the court was required to decide was whether either parent was “willing to exercise or capable of exercising such care and control” of their children. *See* § 8-201(13)(a)(i). The evidence was relevant to the court’s consideration of whether services previously provided to the family had enabled James to parent effectively on a continuous basis. *See* § 8-844(B). The evidence was relevant to these and other issues presented in the dependency action and James has not established he was unduly prejudiced by the admission of this evidence.

¶11 We additionally reject James’s contention that the juvenile court deprived him of a fair hearing by not also permitting him to introduce evidence related to the

previous dependency proceeding. ADES had questioned the CPS case manager Mike Joosten, who had coordinated the services for the family in the previous dependency, about the history of that proceeding and the family's general background. James did not object. After James's counsel cross-examined the witness at length, he asked whether Jessica had been violent towards the case manager in the past; ADES objected. Before ADES could state the basis for its objection, the court asked, "What is the relevance of any of this?" The court commented,

I'm sitting here thinking I'm trying the last case, previous case. That case has already been tried. We need to try this case. I'm not particularly interested in how many times Mr. Joosten went to see the child in the past depend[a]ncy case. I don't think it's relevant. That case is over. That case was closed. This is a different case. We need to focus on this case.

¶12 James's counsel responded, "the problem is that case was closed, laying foundation, groundwork for this case." The juvenile court rejected this explanation and rejected James's apparent defense that the recent petition had to be filed because of Jessica and her persistently disruptive behavior. "The parents cannot say, this is all a sixteen year old's fault," the court said. "CPS didn't fix the 16 year old, therefore, we are absolved of all responsibility. They couldn't fix her, how can we be expected to fix her? That doesn't fly." When counsel attempted to further explain his reasons for the line of questioning he had pursued, the court responded that counsel's questions "had absolutely nothing to do with the condition of the home." Counsel agreed to "move on" and continued to question the witness about a variety of matters, including services previously provided.

¶13 The record shows the juvenile court did not prevent James from asking any questions about the prior proceeding entirely. Rather, the court exercised its discretion in limiting cross-examination to matters it deemed relevant. *See State v. Ellison*, 213 Ariz. 116, ¶ 52, 140 P.3d 899, 915 (2006) (appellate court reviews trial court’s ruling limiting cross-examination for abuse of discretion); *State v. Riley*, 141 Ariz. 15, 20, 684 P.2d 896, 901 (App. 1984) (“[R]eversal will occur only when the trial judge places unreasonable limitation on cross-examination.”). Under the circumstances the court did not abuse its discretion. Moreover, we agree with ADES that, even assuming the court had erred, James was not prejudiced by the reasonable limitation placed on cross-examination of the case manager. And James has not argued otherwise. The record does not support James’s contention he was deprived of his right to a fair hearing.

¶14 The juvenile court’s order adjudicating James’s two children dependent as to him is affirmed.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Judge